



The Bar Council

Bar Council response to the Department for Business and Trade Consultation on enhanced dismissal protections for pregnant women and new mothers

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business and Trade Consultation on enhanced dismissal protections for pregnant women and new mothers.¹

2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

3. To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

¹ [Make Work Pay: enhanced dismissal protections for pregnant women and new mothers - GOV.UK](#)

4. As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Questions 1 – 6:

5. These questions are for those responding to the consultation based on personal experience as pregnant women and new mothers. Whilst many of our members will have had such experiences, as a professional organisation representing the Bar of England and Wales we decline to respond.

6. We advise and represent both businesses faced with a potential legal issue and individuals who are seeking to claim maternity discrimination.

Question 7: In your view, how common are concerns or complaints related to unfair dismissal or treatment during pregnancy?

7. B. In our experience claims of unfair dismissal or discriminatory treatment related to pregnancy are common, albeit less common than claims for unfair dismissal or discriminatory treatment related to disability or race.

8. In our view, the majority of claims fall into one of the following categories:

- i) Where a woman has told her employer that she is pregnant and shortly thereafter she is dismissed or subjected to detriment;
- ii) Where an employer has dismissed a woman and there is a disagreement over when the employer was informed about the pregnancy which is relevant in terms of knowledge of the “protected period” in law and
- iii) Where a woman experiences unfavourable treatment such as a non-payment of a bonus due to pregnancy or maternity leave.

9. Other complaints are possible and we do see them including cases in which time off for antenatal reasons or pregnancy sickness leads to detriment or dismissal and more complex disputes connected with redundancy / returning to work where the returner’s role is said to have changed or disappeared and there is a dispute as to whether there is suitable alternative employment. However, the above complaints are the most common.

Question 8: In your view, how common are concerns or complaints related to unfair dismissal or treatment during new motherhood (i.e. on Maternity Leave or when recently returned to work)?

10. B. In our experience claims of unfair dismissal or discriminatory treatment related to new motherhood are common, albeit less common than claims for unfair dismissal or

discriminatory treatment related to disability or race. They are often linked to issues around flexible working which is presented, more often than not, as a complaint of indirect sex discrimination.

11. Please see the answer to 7 above.

Question 9: In general, when do you think pregnant women and new mothers are at most risk of unfair treatment? (Please select all that apply)

12. A and C. Claims for unfair treatment during pregnancy and soon after new mothers have returned to work are most common, in particular i) those concerning maternity cover and the re-allocation of work upon re-entering the workforce and ii) the calculation of pay, including bonuses in the protected period and thereafter.

Question 10: In general, when do you think pregnant women and new mothers are at most risk of dismissal? (Please select all that apply)

13. D. There are two common scenarios:

- i) Women, often but not necessarily those in smaller, owner-run businesses are most at risk of unfair treatment upon informing their employer of their pregnancy. A decision to dismiss can follow, often within a short period. The employer is unlikely to have sought legal advice. Such claims can reach a Tribunal hearing and result in a finding of discrimination under s.18 Equality Act 2010 which can include the act of dismissal as the discriminatory act in question under section 39.
- ii) In our experience, pregnant women and new mothers are at particular risk of dismissal six to twelve months after they have returned to work. This may be because most employers are sufficiently aware of the legal risks of dismissing pregnant women or newly returned mothers, but consider the risks of doing so diminish with time after their return.

Question 11: What impact have the 2023/24 extended redundancy protections for pregnant women and new mothers had on how pregnant women and new mothers are treated in the workplace?

14. D. We do not know. The Bar has experience of being asked to advise employers on the application of the law in this area. We consider that should disputes arise on such a point, most claims will be compromised prior to litigation. We have not noticed any noticeable volume of claims before the Tribunal that relate to or turn on the extended redundancy protections. However HMCTS should be able to assist with the data on claims coded in this regard.

Question 12: What kind of test should be used to decide whether a pregnant woman or new mother was fairly dismissed during the protected period?

15. C. We consider that the current legal tests for unfair dismissal adequately balance the need to protect pregnant women and new mothers with the needs of employers. There is no need to remove capability, conduct, redundancy, statutory restriction or some other substantial reason from the potentially fair reasons when it comes to pregnant women or new mothers. The range of reasonable responses test, which will take into account all the circumstances, will include consideration of factors relevant to pregnancy and new motherhood, such as any ill health and/or absence caused by pregnancy and new motherhood and the particular adverse impact upon financial circumstances and wellbeing of a loss of employment. Furthermore, whilst this question focuses on unfair dismissal, it is important to acknowledge that this test sits alongside the rights and protections that exist in s.18 Equality Act 2010. We consider that this is all the more reason to retain the current test for unfair dismissal, which is capable of taking into account all legitimate factors and is well understood. The practical impact is that for an employer to dismiss a pregnant woman or new mother without adverse legal consequence its reasoning must be fair and robust. A dismissal that is tainted by discrimination (i.e. unlawful under Equality Act 2010) will likely be unfair as well, though not always as the two issues are considered separately.

Question 13: If 'A' to question 12, what should that new test be? (Please select all that apply)

16. D. Other. This is not applicable given our answer to (12) above.

Question 14: Thinking about the fictional examples above - and any personal or professional experience you may have - when do you think it should be possible to dismiss a pregnant woman or new mother on grounds of conduct? (Please select all that apply)

17. A. We answer based on professional experience only. We consider that, as is currently the legal position, an employer should be able to dismiss a pregnant woman or new mother on grounds of conduct when it is within the range of reasonable responses to do so, taking account of all of the circumstances. We note that in practice this will normally mean a dismissal can only be fair in circumstances where misconduct is either gross misconduct or misconduct that has been repeated over a period. As detailed in our answer to (12) above, we consider that when taking into account all the circumstances, factors relevant to pregnancy and maternity will be incorporated, such as the impact of any ill-health or absence and the particular adverse effect of losing employment upon a pregnant woman or new mother.

Question 15: Thinking about the fictional examples above - and any personal or professional experience you may have - when do you think it should be possible to dismiss a pregnant woman or new mother fairly on grounds of capability? (Please select all that apply)

18. A. We answer based on professional experience only. We consider that, as is currently the legal position, an employer should be able to dismiss a pregnant woman or new mother on grounds of capability when it is within the range of reasonable responses to do so, taking account of all of the circumstances. As detailed in our answer to (12) above, we consider that when taking into account all the circumstances, factors relevant to pregnancy and maternity will be incorporated, such as the impact of any ill-health or absence and the particular adverse effect of losing employment upon a pregnant woman or new mother.

19. If the mischief that the government is looking to alleviate is the number of new mothers who are subsequently dismissed because of the effects of pregnancy or maternity, then we would suggest that the area which is most appropriate for reform is s.18 Equality Act 2010 rather than the law of unfair dismissal. This is the statutory provision which most squarely addresses the issue of dismissals rendered unlawful by reason to their link to a protected characteristic or status including sex or maternity.

20. At present, s.18 protects a pregnant woman or mother in the protected period from unfavourable treatment i) because of the pregnancy ii) because of illness suffered by her as a result of the pregnancy and ii) because she is exercising/seeking to exercise/has exercised her right to ordinary or additional maternity leave.

21. The restrictive nature of this was demonstrated in the Employment Appeal Tribunal Judgment of Interserve FM Ltd v Tuleikyte (2017) UKEAT/0267/16/JOJ/. This is a key authority on the approach to causation under s.18 and is a good example of how pregnancy/maternity can adversely impact a woman who in turn does not have a legal remedy.

22. Whilst s.18 uses the language of 'unfavourable' treatment and does not require a comparator and is thus distinct from direct discrimination, it is much more opaque as to 'something arising in consequence of maternity'. Section 18 Equality Act 2010 occupies a hybrid position between direct discrimination (s.13) and the wider causative test which only applies to disability to be found in s.15 Equality Act 2010.

23. There is much to be said for seeking to implement any reform in this area not by amending Employment Rights Act 1996 but in considering adopting the mechanism and architecture of s.15 Equality Act 2010 and applying it to the protected characteristic of sex and expressly providing for its application to the protected status of maternity which we accept would need to be consistent with the provisions specifying when that special status is protected in law found in the Employment Rights Act 1996 and subordinate legislation. This would include an objective justification test as exists in s.15 Equality Act 2010. Any such

protections in an amended s.18 would need to be in addition to the current wording of s.18 and not operate so as to remove or water down any rights that already exist.

Question 16: Thinking about the fictional examples above - and any personal or professional experience you may have - when do you think it should be possible to dismiss a pregnant woman or new mother fairly on grounds of redundancy during the protected period? (Please select all that apply)

24. A. We answer based on professional experience only. We consider that, as is currently the legal position, an employer should be able to dismiss a pregnant woman or new mother on grounds of redundancy when it is within the range of reasonable responses to do so, taking account of all of the circumstances. Consultation will still be required. As detailed in our answer to (12) above, we consider that when taking into account all the circumstances, factors relevant to pregnancy and maternity will be incorporated, such as the impact of any ill-health or absence, including on the effect of such absence on the data used to score in a redundancy selection and the particular adverse effect of losing employment upon a pregnant woman or new mother.

25. We also consider that our answer regarding the scope of s.18 Equality Act 2010 to Q.15 may also be of relevance here.

Question 17: Thinking about the explanation above - and any personal or professional experience you may have - when do you think it should be possible to dismiss a pregnant woman or new mother fairly on grounds of statutory prohibition during the protected period? (Please select all that apply)

26. A. We answer based on professional experience only. We consider that, as is currently the legal position, an employer should be able to dismiss a pregnant woman or new mother on grounds of statutory prohibition when it is within the range of reasonable responses to do so, taking account of all of the circumstances. As detailed in our answer to (12) above, we consider that when taking into account all the circumstances, factors relevant to pregnancy and maternity will be incorporated, such as the impact of any ill-health or absence and the particular adverse effect of losing employment upon a pregnant woman or new mother.

Question 18: Thinking about the explanation above - and any personal or professional experience you may have - when do you think it should be possible to dismiss a pregnant woman or new mother on grounds of SOSR during the protected period? (Please select all that apply)

27. A. We answer based on professional experience only. We consider that, as is currently the legal position, an employer should be able to dismiss a pregnant woman or new mother

on grounds of SOSR when it is within the range of reasonable responses to do so, taking account of all of the circumstances. As detailed in our answer to (12) above, we consider that when taking into account all the circumstances, factors relevant to pregnancy and maternity will be incorporated, such as the impact of any ill-health or absence and the particular adverse effect of losing employment upon a pregnant woman or new mother.

Question 19: When should employees be entitled to the enhanced dismissal protections?

28. D. Other. This is for Parliament and we have no comment.

Question 20: At what point should the enhanced dismissal protections start for pregnant women?

29. D. Other. This is for Parliament and we have no comment.

Question 21: When should the protection 'window' for new mothers entitled to maternity leave end?

30. A. It appears sensible to align with existing protections. In our experience, and given our answer to (10) above, there is particular vulnerability arising six months or after a new mother returns to work. The duration of the protected period may therefore be a matter as to which further thought is given.

Question 22: Should women who are not entitled to Maternity Leave have protection against dismissal for two weeks after the end of their pregnancy?

31. B. No, we consider the existing legal tests to be adequately protective.

Question 23 – 25:

32. N/A.

Question 26: Do you think that parents who take long, family leave entitlements (i.e. Adoption Leave, Shared Parental Leave or Neonatal Care Leave) are vulnerable in a dismissal situation?

33. A. Yes. We do not consider these situations to equate with the vulnerability of pregnancy or new motherhood because of the physical and psychological recovery required by a woman who has given birth. Nonetheless, any employee removed from the workforce for a significant period of time would appear to be at an increased risk. Negative assumptions

about the ability or willingness of an employee with significant caring responsibilities to devote time to their work could affect these groups too.

Question 27: Do you think the enhanced dismissal protections should also cover employees taking these other types of long family leave? (Please select all that apply):

34. N/A. We have not endorsed enhanced dismissal protections.

Question 28: Thinking about your answer to question 27, should the protection against dismissal start from the first day of the leave?

35. -

Question 29: Thinking about your answer to question 28, how long should the protection against dismissal last? (Please select all that apply)

36. -

Question 30 – 32

37. N/A. We have not endorsed enhanced dismissal protections and are not best placed to answer these questions.

Question 33: What unintended consequences, if any, do you think could arise from the enhanced dismissal protections? (Please select all that apply)

38. We are best placed to comment upon E. Those dismissals that do occur are only considered fair where an employer has robust reasoning, a fair process and where particular factors related to pregnancy and new motherhood have been taken into account and do not render the process unfair. We suspect that access to legal advice, affordable representation and effective redress through enforcement of tribunal judgments pose greater difficulties to pregnant women and new mothers as a vulnerable cohort than the present state of the law on unfair dismissal.

Question 34: What unintended consequences, if any, do you think could arise if the policy were to exclude capability and SOSR as fair reasons to dismiss a pregnant woman or new mother (paragraph 36)?

39. Whilst there is no reason to consider this a particular issue for pregnant women and/or new mothers, at population level there will always be those who take advantage of any

perceived invulnerabilities to consequence e.g. by making less effort at work or refusing to participate in performance enhancing measures.

40. These statutory provisions exist within the Employment Rights Act 1996 for a reason. The potentially fair reasons are there to cover most scenarios with SOSR designed as the catch-all for other scenarios. Employers should be able to take action which complies with the law and to remove part of the 'bandwidth' of potential scenarios risks overcomplication and a detachment from the reality of what may happen in a business.

Question 35: What action(s) could be taken to mitigate against any unintended consequences? (Please select all that apply)

41. D. We do not see how these risks could be avoided.

Question 36: What do you think are the main causes of pregnancy and maternity discrimination? (Please select all that apply)

42. C and E and F. In our experience, liability attaches to employers who:

- i) Have a knee jerk reaction to pregnancy perhaps in making assumptions or stereotyping pregnant women / maternity returners;
- ii) Prioritise other matters ahead of their legal obligations and
- iii) Fail to adequately consider the application of the contract or policies during pregnancy and maternity leave and thus cause unfavourable treatment.

Question 37: What other changes should the government prioritise to tackle pregnancy and maternity discrimination?

43. We would suggest reform of s.18 Equality Act 2010 as detailed above. The Equality Act 2010 is a better vehicle for meaningful reform rather than the Employment Rights Act 1996.

Bar Council

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For further information please contact:

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